

**THE HIGH COURT
JUDICIAL REVIEW**

[2019 No. 267 JR]

BETWEEN

B.S. (INDIA), A.A.D.

AND

Z.S.S. (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND A.A.D.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

NO. 3

JUDGMENT of Mr. Justice Richard Humphreys delivered on Monday the 12th day of October, 2020

1. In *B.S. (India) v. Minister for Justice and Equality (No. 1)* [2019] IEHC 367, [2019] 5 JIC 1011 (Unreported, High Court, 10th May, 2019), I granted an interlocutory injunction restraining the deportation of the first-named applicant, and partially dismissed the proceedings.
2. In *B.S. (India) v. Minister for Justice Equality (No. 2)* [2020] IEHC 401, [2020] 8 JIC 1701 (Unreported, High Court, 17th August, 2020), I granted a substantive injunction in fairly limited terms in favour of the applicants, and dismissed the balance of the remaining reliefs sought.
3. The respondent now seeks leave to appeal, and in that regard I have considered the relevant caselaw, in particular *Glancre Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, High Court, MacMenamin J., 13th July, 2006); *S.F.A. (a minor) v. Minister for Justice Equality and Law Reform* [2016] IEHC 222 (Unreported, High Court, Mac Eochaidh J., 25th April, 2016); *Luximon v. The Minister for Justice, Equality & Law Reform* [2015] IEHC 383 (Unreported, High Court, Barr J., 17th June, 2015); *I.R. v. Minister for Justice Equality and Law Reform* [2009] IEHC 510, [2015] 4 I.R. 144; *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646, [2016] 11 JIC 1404 (Unreported, High Court, 14th November, 2016); and *S.T.E. v. Minister for Justice and Equality* [2016] IEHC 544, [2016] 10 JIC 1401 (Unreported, High Court, 3rd October, 2016). I have received helpful submissions from Mr. John P. Gallagher B.L. (with Ms. Siobhán Stack S.C.) for the respondents and in reply from Mr. Paul O'Shea B.L. for the applicants. On 19th August, 2020, having heard the matter, I informed the parties of the order being made and indicated that reasons would be given later.

Applicants' objections in principle to leave to appeal

4. The main objections made by the applicants are that the questions are too general and academic, don't arise from the judgment and will be moot fairly shortly. The objection as to generality can probably be best answered by saying that there is definitive appellate clarification in relation to the grant of interlocutory injunctions, but not to the same extent in relation to injunctions as a substantive relief, so accordingly there is a discrete point here that merits being teased out in an appellate context. Indeed, the mootness of the case might actually be a positive advantage in terms of considering the jurisdictional

question relating to substantive injunctions in a more leisurely way. Mr. Gallagher makes the valid point that the short-term nature of an order of the kind made here would render any similar case moot by the time it got to the appeal stage, so the only way that the point could really be dealt with would be on the basis of an exception to the doctrine of mootness. As regards the specific questions proposed for certification, it makes sense to start first with questions 2 and 3.

Proposed question 2

5. In this question, the State is yet again complaining about an order allowing an amendment to pleadings. Welcome to Groundhog Day.
6. Question 2 is about whether one can seek an amendment based on matters that subsequently arise including new reliefs not pleaded when the proceedings commenced. There is nothing to that objection for a host of reasons. While Ms. Stack did complain about “rolling amendments”, she didn’t argue at the hearing that I didn’t have jurisdiction to grant the amendment, or as question 2 puts it, the court “wasn’t entitled” to allow the amendment. So it can’t be constitutionally proper to ventilate such a point for the first time on appeal.
7. I have already been through this very point in *Habte v. The Minister for Justice and Equality* [2019] IEHC 47, [2019] 2 JIC 0405 (Unreported, High Court, 4th February, 2019), at para. 30, where I pointed out that the Supreme Court in *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61, [2018] 1 I.L.R.M. 109 noted without adverse comment at (para. 22) that I had allowed the applicant to amend judicial review proceedings to challenge a decision that had been made in the course of the proceedings themselves by way of a new relief. But even more fundamentally, the Supreme Court went on (at para. 84) to envisage an application to make yet a further amendment to the proceedings following a further hypothetical decision that was at that point yet to be made. That can only be regarded as approval for a procedure of incorporating challenges to subsequent, but related, decisions into the one set of proceedings where, of course, it is appropriate to do so. Often it is appropriate because it saves the costs of a whole second set of fresh proceedings. The respondent argues at para. 12 of written submissions here that allowing the amendment “to some extent supplants the normal administrative process by which Treaty rights/Chen rights are determined whereby the relevant facts and pleadings are firmly brought to the relevant decision maker in the required format and within the requisite time limits and replaces it with one which is supervised by the court”. But it doesn’t do any such thing. It just saves the expense of a second set of proceedings to challenge the later, related, decision.
8. Mr. Gallagher also argues that because the reliefs are going to be different, the Supreme Court decision in *Keegan v. Garda Síochána Ombudsman Commission* [2012] IESC 29, [2012] 2 I.R. 570, doesn’t apply. But of course it is child’s play to distinguish any given case. As I pointed out in *Habte*, Glanville Williams in that indispensable book, *Learning the Law* (11th ed., London, Sweet & Maxwell, 1982) p. 77, notes that a judge can, if so minded, “seize on almost any factual difference between this previous case and the case before him in order to arrive at a different decision”; that being an empirical rather than a

normative observation. Anyway, there are a lot of other cases that cannot be distinguished quite so easily. I have already referred to *Y.Y.* where the Supreme Court envisaged an amendment to allow a new relief to challenge a decision yet to be made.

9. The caselaw is clear that the real question is not to be framed in terms of technical dogma but is whether the amendment will promote a resolution that enables the court to determine the real issues in question: see Hilary Biehler, Declan McGrath & Emily Egan McGrath, *Delany and McGrath on Civil Procedure*, 4th ed., (Dublin, Round Hall, 2018), at p. 283, ff. In *Moorehouse v. Governor of Wheatfield Prison* [2015] IESC 21, (Unreported, Supreme Court, 5th March, 2015), at paras. 39-42, MacMenamin J. (Murray and Laffoy JJ. concurring), endorsed the point that the interests of justice and fair procedures were central. In *Croke v. Waterford Crystal Limited* [2004] IESC 97, [2005] 2 I.R. 383, [2005] 1 I.L.R.M. 321, the Supreme Court emphasised that the power to amend was intended to be "*liberal*" and was meant to ensure that the real matters in controversy were determined. The court emphasised that pleadings were not to be a snare and it was not the function of the court to punish the parties for their mistakes, *per* Geoghegan J. in *Croke* citing the view of Lynch J. in *DPP v. Corbett* [1992] I.L.R.M. 674 at 678, that "*[t]he day is long past when justice could be defeated by mere technicalities which did not materially prejudice the other party.*"
10. O'Donnell J. (McKechnie and Laffoy JJ. concurring) in *O'Neill v. Appelbe* [2014] IESC 31 (Unreported, Supreme Court, 10th April, 2014), at para. 14, emphasised that "*[t]he High Court, and this Court on appeal, has a very extensive power of amendment where it is necessary to permit the real issues in dispute to be determined.*"
11. In *Persona Digital Telephony Ltd. v. Minister for Public Enterprise* [2019] IECA 360 (Unreported, Court of Appeal, Donnelly J. (Baker and Costello JJ. concurring), 16th December, 2019), at para. 12, cited the view of Birmingham J., as he then was, in *Rossmore Properties Ltd. v. Electricity Supply Board* [2014] IEHC 159 (Unreported, High Court, 14th March, 2014), at para. 19, setting out the principles in relation to amendments, noting in particular that the jurisdiction "*is intended to be applied liberally*", that "*[a]mendments shall be made for the purposes of determining the real questions in controversy between the parties*" and that "*[t]here is no rule that per se precludes radical amendments*". Birmingham J. also went on to say that "*[t]here is no rule against introduction of a new cause of action if it falls within the ambit of the original grievance*" - a formula seized on and construed narrowly by the respondent here. But grievance means the subject matter, not its technical parameters in the pleadings, and the applicants' complaints in relation to how the matters developed here all relate back to the basic subject matter of seeking to prevent the first-named applicant's deportation. The amendments in that sense fall well within the ambit of the original grievance.
12. Mr. Gallagher also argues that the matter is statutory and that, therefore, deportation is different because it is a "*regulated context as distinct from an unregulated context*". But there is no unregulated context when we are talking about public law challenges. Regular judicial review is governed by Order 84 of the Rules of the Superior Courts which is, I

need hardly say, enacted by statutory instrument. That is as much a part of the statute book as primary law, and whether the time limit is 28 days under the relevant Act or three months under a statutory instrument makes no difference to the principle. The principle is that there is a time limit established by law. Essentially, the respondents' submissions here make the classic error of conflating the distinction between the time for initiation of the proceedings and the possibility of later amendment. As I pointed out again in *Habte*, that whole erroneous line of thought as to the conflation of delay in initiation of the proceedings with delay in seeking an amendment was very presciently anticipated by Keane J., as he then was, in his illuminating and far-sighted decision in *Krops v. The Irish Forestry Board Ltd.* [1995] 2 I.R. 113, approved by the Supreme Court in *Smyth v. Tunney* [2009] IESC 5, [2009] 3 I.R. 322 and *O'Leary v. Minister for Transport, Energy and Communications* [2000] IESC 16, [2001] 1 I.L.R.M. 132, in which he said that "*the pleadings which initiate an action in this Court carry with them from the time they are issued or delivered the potentiality of being amended by the Court in the exercise of its general jurisdiction to allow a party to amend his indorsement or pleadings "in such manner and on such terms as may be just"*".

13. Mr. Gallagher also argues that the 28-day time limit must be given weight in the context of amendments. But I am giving it weight. Indeed I am doing more than that, I am applying it, by specifically saying that in the case of grounds for challenge that arise *after* the date of the decision in question, the challenge should be brought within 28 days from those grounds arising. Overall there is nothing to the respondents' complaints in relation to the amendments. The only effect of going with those points during the hearing would have been to require a multiplicity of judicial reviews rather than consolidating all the issues in the present proceedings. I'm not sure that I would have been doing appellate courts a favour had I forced the applicants down the former path.

Respondents' proposed question 3

14. Question 3 relates to how to calculate the running of time in the context of facts such as these. While phrased generally, that is really a fact-specific question. At its height, the respondents' argument is that I incorrectly applied the test to the particular and fairly unusual facts of the case. That is not much of a point of law, still less one of particular importance.

Proposed question 1

15. Turning to the first question, Mr. Gallagher argues that the court should have started with the assumption that there should be no injunction and that the deportation order should be in force, impliedly arguing that I didn't do that, or didn't do it expressly. But of course that argument was never made in that form at the hearing. Had it been made, I would have expressly said that of course I factored in the presumption of validity of the deportation order. That is implicit in para. 54(i) of the (*No. 2*) judgment where I said that satisfying the test in *Okunade v. Minister for Justice and Others* [2012] IESC 49, [2012] 3 I.R. 152, is not enough. That implies that a presumption in favour of the existing executive decision is built in because the applicants have to establish something more. The respondents also argue that even if the applicants establish the first-named applicant's paternity, that doesn't give them a right to have the deportation order set

aside. That is of course correct and I acknowledged that in the (*No. 2*) judgment, but what the applicants do have is a right to have the Minister consider the position on the basis of the actual correct factual situation having first had a reasonable opportunity to put that factual situation before the Minister.

16. Mr. Gallagher also relies on *K.R.A. v. Minister for Justice and Equality* [2017] IECA 284, [2019] 1 I.R. 567 (at 614, para. 119), *per* Irvine J., as she then was, which in essence upheld a point that I made in the decision appealed from to the effect that if the Supreme Court decision in *L.C. v. Minister for Justice* [2006] IESC 44, [2007] 2 I.R. 133, applies, then there must be exceptional circumstances for an injunction against a deportation order. Mr. Gallagher said that I did not establish any exceptional circumstances in the present case. The problem with that plausible-sounding argument is that that's because I held in the (*No. 2*) judgment that *L.C.* dealt with a different situation. Like *K.R.A.*, it was a challenge to deportation on the basis of a point that had existed all along, rather than one that arose subsequent to the decision challenged. This case is in the latter and very different category.
17. Mr. Gallagher also argues that s. 28(8) of the Supreme Court of Judicature Act (Ireland) 1877 doesn't apply to deportation matters. That seems to me a totally implausible argument and it would emasculate the court's equitable jurisdiction to start deciding that the jurisdiction to grant injunctions doesn't apply in particular situations where that would be inconvenient from a State point of view. Even if the 1877 Act magically doesn't apply, which I don't for a moment accept, there is an analogous inherent jurisdiction of the court exercised by the Courts of Chancery prior to the legislation of the 1870s in both Britain and Ireland, a point made by Lord Nicholls referred to in the (*No. 2*) judgment at para. 43. And even if that's somehow wrong, the court has an inherent jurisdiction to grant orders to uphold rights protected by the Constitution, EU law, or Irish law, including the ECHR to the extent provided by statute.
18. Fundamentally though, the proposed first question relates to the circumstances in which a substantive injunction as a final order can be granted to restrain deportation and is a sort of a composite question, packing together the various points in para. 54 of the (*No. 2*) judgment. It seems to me that there is a point of importance here, but it would help the Court of Appeal if I enumerated those issues separately rather than in a kind of a rolling omnibus form as proposed by the State. An express articulation of the issues is in essence set out in para. 54. The only real difference Mr. Gallagher could point to was that I didn't specifically say at para. 54 that the deportation order was unchallenged, but that is implicit in saying very clearly that the grounds for the present challenge didn't exist originally.
19. Mr. O'Shea also points out that the State submissions are predicated on the assumption that the applicants don't have any legally enforceable right, but that isn't the case and the judgment finds otherwise. That is an important point that no doubt the Court of Appeal will take into account in terms of how the issue is to be considered. I indicated that there were two possible routes to arriving at jurisdiction to grant the injunction: firstly, because

it was just or convenient to do so or alternatively because the applicants had a derivative enforceable right on any one of the bases set out in the (*No. 2*) judgment and that, therefore, an injunction was appropriate to enforce such rights. So either the applicants have relevant rights or they don't – if they do I think an injunction is appropriate to give effect to those rights and even if not I considered it to be just or convenient to grant the order in the particular circumstances. The order is absolutely not predicated on a finding that the applicants don't have any enforceable rights, but nor does it depend on the finding that they do.

Extension of time

20. The respondents seek an extension of time to appeal insofar as part of the reasoning for the order is contained in the (*No. 1*) judgment. That was an interim judgment, so generally it is reasonable for a party to wait for the final judgment before appealing all matters. Order 58, rule 9 (formerly rule 16) RSC, provides that failure to appeal an interlocutory ruling does not prevent the Supreme Court from making whatever order is just (in the context of an appeal of the final order). Strangely there doesn't seem to be an express equivalent in O. 86A regarding appeals to the Court of Appeal but the same principle must apply. In the US, the "*finality rule*" generally (albeit not invariably) requires appellants to wait – 28 USC s. 1291 provides that final orders are appealable as of right to the Courts of Appeals, but apart from injunctions and other limited cases (s. 1292(a)), interlocutory orders require to be designated by the trial court to allow appeals under s. 1292(b) - see *e.g., Gelboim v. Bank of America* 135 S.Ct. 897 (2015) *per* Ginsburg J. for a unanimous court, "Notes, The Finality Rule for Supreme Court Review of State Court Orders" 91 *Harvard Law Review*, No. 5 (Mar., 1978), pp. 1004-1032.
21. A finality rule would seem to benefit both first instance courts to avoid interrupting their procedures, appellate courts to avoid multiple appeals, and indeed the parties to avoid the inconvenience of interim appeals. It seems to me a commendable practice worthy of more general consideration, but any application of the concept needs to be supported by allowing an extension of time to seek leave to appeal any interim decision where that is relevant to the attempt to appeal a final order in a timely manner.

Order

22. Accordingly, the order I made on 19th August, 2020 was as follows:
 - (i). insofar as it was necessary, I granted an extension of time for the making of the application for leave to appeal;
 - (ii). I certified that the decision of the court involves points of law of exceptional public importance (being the points of law referred to in para. 54 of the (*No. 2*) judgment) and that it is desirable in the public interest that an appeal should be taken to the Court of Appeal;
 - (iii). I granted leave to appeal to the Court of Appeal under s. 5 of the Illegal Immigrants (Trafficking) Act 2000 against the order of 30th July, 2020 including insofar as that order relies on reasoning in the (*No. 1*) judgment;

- (iv). it is agreed by the parties that the leave to appeal will include any decision as to costs which may be made in due course;
- (v). I varied the injunction granted by virtue of the order of 30th July, 2020 so that it will be conditional on the applicants providing an update to the respondents at least every 14 days as to progress with the DNA test; and
- (vi). finally, as regards costs and as regards the respondents' application for the DAR in relation to preparing for costs hearing, by consent in accordance with the established approach, the respondents should file their notice of appeal to the Court of Appeal first as against the order of 30th July, 2020 and once that has been done, the respondents can notify the court and arrangements can be made then for a formal application for the DAR.